WAR FOOD ADMINISTRATION
OFFICE OF DISTRIBUTION
Washington 25, D. C.

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SUMMARIES OF DECISIONS BY THE WAR FOOD ADMINISTRATOR
on complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

Number 278 December 29, 1944

S-3135, September 19, 1944, Docket 4306: (S. P.)

F. J. CRIVELLA, PITTSBURGH, PA. v. H. P. HALE & SON, GIBSON, TENN.

Violation charged: Failure to deliver car of tomatoes in accordance with contract terms.

M-7
D-4x

Principal points involved: Seller's failure to pay allowance granted through its agent was in violation of section 2 of Act; tomatoes showing at destination 6% decay and 6% sunken, discolored areas, after normal transit, were not in suitable shipping condition.

Order: Complainant awarded $337.50, plus interest; respondent's countercomplaint dismissed; publication of facts.

Reconsideration: Petition filed by respondent dismissed and order made effective December 7.

Outline of facts

On June 22, 1943, complainant purchased from respondent, through a broker acting as agent for both parties, as approximately 90% U. S. No. 1, a carload of tomatoes which graded approximately 88% U. S. No. 1 at shipping point and contained no decay, at $4.50 per lug f.o.b. Gibson, Tenn. The car arrived at Pittsburgh, Pa., June 26, after four days in transit, which was found to be according to normal schedule in view of war-time difficulties in transportation. Inspection at 1:15 on that date showed an average of 8% decay. Complainant claimed to have notified respondent's broker of the abnormal deterioration and that respondent granted an allowance of 50¢ per lug, or $337.50; and that, relying upon such allowance, complainant paid the full amount of respondent's draft, but respondent failed to remit to cover the allowance, for which an award was asked.

Respondent claimed that he agreed to refund 50¢ per lug in reliance upon false information given by the broker, acting as complainant's agent, that the shipping point inspection certificate had been reversed by an appeal inspection and that the contract of sale was fully complied with, the decay found by the inspection made at Pittsburgh not being found excessive and not showing that the tomatoes were not in suitable shipping condition. He filed a countercomplaint for recovery of loss alleged to have been sustained because

of complainant's unjustified rejection of another car of tomatoes, shipped June 23, 1943, sold on an f.o.b. basis as U. S. No. 1, and certified at Gibson as grading U. S. No. 1, with no decay, claiming that inspection at Pittsburgh on June 28 (car having arrived Saturday, June 26) was restricted to the top layer or the top two layers, which would indicate an average for the entire load of less than 5% decay, the usual tolerance permitted for decay at destination, and concluding that 6% in the top layer of tomatoes delayed one day in transit and remaining on track 36 hours before inspection at destination does not indicate a lack of suitable shipping condition.

The broker, in a letter dated July 15, 1943, incorporated in complainant's opening statement of facts, stated that respondent was informed that the inspection of the tomatoes in the car first mentioned above, made on June 26, showed that an average of 8% were affected by decay, and that this percent is beyond the tolerance for a car confirmed as 90% U. S. No. 1. The broker stated that he did not inform respondent that the shipping point inspection had been reversed.

Rulings included in decision

1. Complainant accepted the tomatoes covered by his complaint, relying on the allowance granted by the broker, who was acting as agent for respondent, and respondent's failure to pay the allowance was in violation of section 2 of the Act. The preponderance of the evidence supported the view that the broker did not give its principal the false information that the inspection had been reversed. Complainant was awarded $337.50, plus interest.

2. The tomatoes in the car covered by the countercomplaint were not in suitable shipping condition. Inspection on June 28 showed an average of 6% decay, ranging from 3 to 12%, and in addition an average of 6% sunken discolored areas. This amount of decay was in excess of the tolerance permitted and, together with the average of 6% sunken discolored areas, was abnormal. It must be presumed that if the inspection had been limited to any particular layer or layers the inspector would have noted the same on the certificate. The tomatoes moved according to normal transportation, since four days in transit from Gibson to Pittsburgh can not be considered abnormal in June 1943, and the delay in inspection until Monday was not unreasonable in view of the fact that inspections are not usually made on Sunday. Respondent's countercomplaint was therefore dismissed.

Reconsideration

Respondent filed a petition for reconsideration on October 11, 1944, whereupon the order of September 19 was stayed. Upon reexamination of the record it appeared that the evidence submitted by complainant supports the original order. Respondent neither presented facts that were not considered when the order was issued nor pointed out the erroneous application to the facts of any rule of law.

Therefore, by order dated November 17, the petition for reconsideration was dismissed and the stay order was vacated, the decision to become effective twenty days after November 17.

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S-3152, October 31, 1944, Docket 4402: (S. P.)

JUSTMAN-FRANKENTHAL CO., NEW YORK, N.Y. v. CURLY BROTHERS, BOSTON, MASS.

Violation charged: Unjustified rejection of 38 crates of celery.

A-7
H-26

Principal points involved: Assumption of dominion over goods constituted acceptance; however, right is reserved to buyer to recover damages as a result of breach of contract; returning of goods to seller constituted rejection without reasonable cause.

Order: Complainant awarded $133, plus interest; publication of facts.

Outline of facts

On September 9, 1943, complainant sold to respondent, through respondent's accredited agent, 38 crates of Pascal celery at $3.50 per crate, or for the total price of $133. The celery was inspected at the time of purchase by respondent's representative. On September 9, respondent's truck took the celery from complainant's place of business in New York to Boston, Mass., but respondent caused the entire load to be returned to complainant in the late afternoon of Saturday, September 11. Due to the fact the market was closed on Saturday afternoon, complainant could not make resale. The next market day was Monday, September 13, four days after the sale, and because of the condition of the celery, having been trucked to Boston and back to New York without refrigeration, it was worthless and complainant was compelled to dump it. An award of damages was sought.

Copy of the report of investigation and of the complaint were served on respondent on August 6, 1944, but no answer was filed. Oral hearing was therefore waived and the allegations of the complaint were deemed to be admitted in accordance with the rules of practice.

Ruling included in decision

1. Respondent's assumption of dominion over the goods, in trucking them from complainant's place of business in New York to Boston, constituted acceptance. Even where there has been a breach of contract by the seller, the act of assuming dominion over the shipment is held to constitute acceptance. However, in such case, the right is reserved to the buyer to recover damages as a result of the breach. In the instant proceeding, respondent did not show a breach by the complainant of any part of the contract.

2. Respondent's returning the celery to complainant constituted a rejection without reasonable cause, in violation of section 2 of the Act. Complainant was awarded $133, plus interest.

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S-3154, November 8, 1944, Docket 4375: (S. P.)

MAINE POTATO GROWERS, INC., PRESQUE ISLE, MAINE v. JOS. MARTINELLI & CO., INC., SPRINGFIELD, MASS.

Violation charged: Unjustified rejection of carload of potatoes.

Principal point involved: Appeal inspection made eight days after arrival showing considerable decay in one stack was not inconsistent with previous inspections.

D-11

Order: Complainant awarded $322.65, plus interest; publication of facts.

Outline of facts

On December 29, 1943, through a broker complainant sold to respondent one carload of U. S. No. 1, Size A, two-inch minimum Green Mountain potatoes, at $2.70 per cwt. delivered. Shipment was made from loading point in Maine of 450 bags, and the car arrived at Springfield on January 5, 1944. Respondent made inspection on January 6 and rejected the carload, claiming excessively affected by field frost. Resale in Springfield resulted in net proceeds of $703.87, and complainant asked for an award of $322.65, representing the difference between the net proceeds of resale and the net contract price of $1,018.87, plus demurrage of $7.65.

Complainant relied upon two Federal inspections to show good delivery. The shipping point inspection made December 29, 1943, and the one made at destination on January 6, 1944, both found the potatoes had less than 1% decay and were U. S. No. 1, size A, two-inch minimum. An inspection certificate made by the R.P.I.A. on January 6 likewise showed that less than 1% decay was noted.

Respondent argued that the potatoes were affected with a disease of field origin, whereas it was entitled to receive sound potatoes which would not develop any appreciable amount of decay during the distribution period of one to five weeks, pointing out that on January 14 a Federal appeal inspection was made and the certificate states as to condition: "In 1 stack next A-end bunker samples examined show 8 to 15 average 11% Wet type Fusarium Tuber Rot either following slight cuts or occurring as soft rot on small spots scattered over surface of affected potatoes. In remainder of load 50% of samples show no soft rot, 40% show 1 to 2%, and 10% show 4%, average 1% for this portion of load."

Since the amount claimed as damages was less than $500, the proceeding was conducted under the shortened procedure.

Rulings included in decision

1. The potatoes graded U. S. No. 1, size A, 2 inch minimum, at the time of arrival. The Government inspection certificate dated January 6 stated that the potatoes contained less than 1% soft rot. This inspection was restricted to the accessible portion of the load. The appeal inspection of the entire load eight days later showed that the contents then failed to grade U. S. No. 1 only because of 11% soft rot in one stack. Between 45 and 55 bags were contained in the stack mentioned. Considering the fact that the appeal inspection was made eight days later, the average amount of decay for the whole carload at that time was not inconsistent with the previous inspection.

2. Respondent's rejection was without reasonable cause and constitutes a violation of section 2 of the Act. Complainant was awarded $322.65, plus interest.

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S-3157, November 18, 1944, Docket 4356: (S. P.)

WILENSKY & CO., CHICAGO, ILL. v. M & M PRODUCE CO., TIMPSON, TEXAS

Violation charged: Failure to deliver four carloads of potatoes complying with contract terms.

Principal points involved: Sale was f.o.b. as to price and
F-10 delivered as to grade, quality and condition; market value
F-13 shown by prices at which reconditioned potatoes sold; measure
G-9 of damages is difference between value at time of delivery
G-10 and value had potatoes answered to warranty.

Order: Complainant awarded $1,064.15, plus interest; publication of facts.

Outline of facts

In June, 1943, complainant purchased from respondent four carloads, of 325 sacks each, of "Victory Grade" potatoes, two on June 8, one on June 9 and one on June 10, at $2.86 per bag f.o.b., or for $3,718 for the four cars. Shipment was made from Timpson and Center, Texas, and the cars arrived in Chicago, Illinois, five or six days later. Although complainant paid the transportation charges, which is not customary in a delivered sale, complainant claimed to have purchased on a delivered basis, because respondent, in addition to the f.o.b. ceiling price of $2.80 per sack, charged 6¢ per sack normally allowed by the O.P.A. regulations on delivered

sales only. Complainant claimed that, because of respondent's failure to make good delivery, damages of $1,141.13 were sustained. This figure consisted largely of the actual cost of certain sacks which were lost in repacking and the loss on other sacks which had to be sold for less than actual cost. How the actual cost was arrived at, was not stated, but apparently it was the contract price plus freight. The balance of the amount claimed was for labor expense in repacking the remainder of the potatoes.

Government inspections were made on June 14 and 15, shortly after arrival of the cars in Chicago. In one car, partly unloaded, some sacks having been taken to complainant's store, the potatoes were affected by Slimy Soft Rot ranging from 1 to 40%, averaging 12%, and in addition there was an average of 9% slightly sunken, discolored, starchy areas, most of which were sticky. Those inspected at the store were in even worse condition. One carload had an average of 45% Slimy Soft Rot, and an average of 10% discolored areas; one, an average of 18% Slimy Soft Rot in the bags remaining in the car, and an average of 15% discolored areas; and one was shown to be affected by Sclerotium Rot ranging from 1 to 30%, average 11%, generally in advanced stages.

Copies of the report of investigation and complaint were served on respondent on February 24, 1944, but no answer was filed. In accordance with the applicable rules of practice, oral hearing was waived, and the allegations of the complaint were deemed admitted.

Rulings included in decision

1. The sale was intended by the parties to be f.o.b. as to price and delivered as to grade, quality and condition. Under such a contract respondent was obligated to tender to complainant at destination potatoes conforming to the contract. Complainant paid the transportation charges.

2. The potatoes did not meet the specification of "Victory Grade." This grade, as adopted by the State of Texas, consists of a combination of U. S. No. 1 and U. S. No. 2, 1½-inch minimum, which must meet the minimum requirements of U. S. No. 2, 1½-inch minimum, including the allowable tolerance for size and grade defects. Neither U. S. No. 1 nor U. S. No. 2 grade permits in excess of 1% soft rot. Government inspections made of the four shipments following delivery at Chicago showed that the percentages of decayed and defective potatoes were far in excess of the tolerance allowed for "Victory Grade."

3. Respondent failed, without reasonable cause, to deliver potatoes which were in accordance with contract terms. The measure of damages for breach of warranty is the difference between the value of the produce at time of delivery and value it would have had if it had answered to the warranty. Complainant sold the reconditioned potatoes for prices of $3.75 to $4 a sack. It appeared

from this that if the potatoes had been as ordered complainant could have sold them for at least $3.75 a sack, or $1,218.75 a carload. This figure was accepted as showing the market value at destination of the quality purchased. Complainant resold the potatoes for $1,119.50, $682.50, $1,074.70 and $1,075.70 a car. Expenses in repacking were $41.50, $18, $48.30, and $33.75, respectively. The loss, therefore, after taking into consideration the repacking expenses, was $140.75, $554.25, $192.35, and $176.80, a total of $1,064.15. Complainant was awarded that amount, plus interest.

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S-3158, November 29, 1944, Docket 4349: (Hearing)

RE: JOSIE COHEN COMPANY, ROCHESTER, N.Y., ET AL., RESPONDENTS

Violation charged: Failure to pay for purchased produce.

Principal points involved: Period for filing disciplinary
C-10 complaint not mentioned in Act; examiner not authorized to
J-10 dismiss complaint at hearing; unless agent obligated to pay
J-14 his principal's debt, his failure to pay would not violate
B-11 Act; failure to pay violates Act regardless of financial
M-22 ability.

Order: Complaint dismissed; publication of facts.

Outline of facts

On March 23, 1944, disciplinary complaint was filed alleging that Sonya Cohen and Josie Cohen, owners of Josie Cohen Company, a licensee, had violated the Act through failing to pay for nineteen separate purchases, in August, September and October 1943, of cantaloups, cranberries, figs, grapes, Irish potatoes, lemons, lettuce, melons, onions and sweet potatoes which moved by rail or truck from California, Colorado, Idaho, New Jersey, or Pennsylvania to the purchaser in New York.

Sonya Cohen admitted that she owned the company and had failed to make the payments because of business reverses, as a result of which she had made an assignment for creditors; Josie denied ownership. Respondents' counsel conceded that Josie managed the business for his wife Sonya, the owner, and asked for dismissal as to Josie because he was not the owner, and did not concede that the Act had been violated under the circumstances. The examiner properly refused to dismiss, as an examiner is not authorized to do so by the rules of practice. After the hearing, respondents reiterated the request for dismissal as to Josie.

On August 31, 1944, complainant filed a suggested order, recommending revocation of license and publication of the facts. In his report, filed October 9, 1944, the examiner proposed revocation of license, publication, and an order directing both Sonya and Josie Cohen to cease and desist from handling perishable agricultural commodities in interstate commerce. When the time for excepting to

the report expired without either party having excepted, the record was submitted for preparation of the order.

Rulings included in decision

1. Sonya Cohen was licensed to do business as Josie Cohen Company. This company bought the commodities but failed to pay for them. Section 2 of the Act requires prompt payment. Failure to pay violates this requirement regardless of financial ability to pay. The repeated failures to pay would authorize revocation of her license and, had it not terminated on October 27, 1944, when the renewal fee was not paid, it would have been revoked. Under the circumstances, the complaint was dismissed, but the facts were ordered published. The cease and desist order recommended by the examiner was not issued as it does not appear to be authorized by the Act.

2. There was no evidence of fraud or collusion between Josie Cohen, the manager or agent, and his principal, the licensee and owner of the business, and the record did not show facts which would make the agent personally obligated to pay the principal's debts. Unless he is obligated to pay, his failure to pay would not violate the Act. Consequently, no order was issued against Josie Cohen.

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S-3159, November 29, 1944, Docket 4389: (Hearing)

Re: Application of Meyer Schuman Co., Chicago, Ill., for a license under the Perishable Agricultural Commodities Act.

J-1
L-10
K-9
K-6

Principal points involved: Applicant and its president not now unfit to engage in business and be licensed; agreement not to engage in produce business accomplished same as revocation, and applicant could not resume business without Secretary's permission; section 4 (b) of Act authorizes but does not require issuance of license upon furnishing of bond.

Order: License to be granted upon posting of $25,000 bond; publication of facts.

Outline of facts

Complaint was filed by the Office of Distribution on August 11, 1944, alleging that Meyer Schuman Company, Chicago, Illinois, who had applied for a license, was unfit to engage in business as a dealer in fresh fruits and vegetables in interstate commerce because of past violations of the Act, in connection with which it had agreed not to engage in any business subject to the Act.

Complainant's evidence consisted of a document in which the applicant and its president, Meyer Schuman, admitted having failed to account correctly to shippers and having falsely reported to them

on numerous occasions in 1939 and 1940; agreed to pay any amounts found to be due shippers by audits to be made later, in addition to amounts already shown paid or credited as a result of completed audits; and agreed to discontinue business within the scope of the Act and in the future to engage exclusively in activities not covered by the Act, and the president promised to have no connection with The Schuman Co., the successor to the applicant, in handling perishable agricultural commodities. As the result of this agreement the applicant was allowed to surrender its license under the Act rather than go through a formal hearing on the charges of violation of the Act. Its president testified that in 1941 he was prompted to surrender the license as he did, and his son took over as president of The Schuman Company, because Meyer Schuman had heart trouble and his doctor advised him to discontinue business, but that his health has improved to such an extent that the doctor advises that becoming interested in his old business will benefit him; that all provisions of the agreement have been scrupulously observed; that all shippers who desired had been allowed to audit the records back to the beginning of the company, even using their own auditors, and resulting claims had been paid; that the shippers had expressed their confidence in the Schuman name by keeping their business with the successor company, and that his son's health is now impaired and he has had to take a long rest. After the hearing the applicant was allowed to submit written statements concerning Meyer Schuman's character, all of which were favorable to him.

Ruling included in decision

It was found that "the acts admitted by the applicant would, by themselves, support a finding that it is unfit to engage as a licensee by reason of having violated the act, but in view of its acts since the violations occurred, the applicant and its president are not found to be now unfit for license. The 1941 agreement enabled the Secretary to accomplish the same practical result as would have been obtained by a revocation of the applicant's license after hearing. That is, the applicant got out of business as a licensee and could not get back into it without the Secretary's permission. By sections 4 and 8 of the act, Congress has specifically provided for this situation. Under these circumstances, we do not consider the agreement contrary to public policy, as the examiner did, even if an agreement with the appropriate governmental officer could ever be said to be contrary to public policy. We conclude that we are fully authorized to hold the applicant to its agreement and deny its application for license. However, we see nothing to prevent our agreeing, with the other parties to an agreement, to modifications in the agreement. Whatever distinction there may be for other purposes, it is considered that for the purposes of this proceeding the situation is the same as if the applicant's license had been revoked in 1941 for its admitted violations of the act. In such a situation the last two sentences of section 4 (b) of the act authorizes, but do not require, issuance of a license if the applicant furnishes a bond.

We have not found the unfitness which would require denial of the application under section 4 (d) of the act, and pursuant to the grant of discretion in section 4 (b) we conclude that the license should be granted upon the posting of a bond." It was therefore ordered that, upon the posting of a satisfactory bond in the amount of $25,000, the applicant shall be issued the license requested. After the bond has been in effect for one year, the appropriate officer of the Office of Distribution, or his successor, may reduce the amount of the bond or may relieve the applicant of the obligation of keeping a bond on file, if in such officer's opinion, the conduct of the applicant is such as to indicate that a bond is not necessary. The facts and circumstances were ordered published.